

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

v

RODREAKES EUGENE FOUNTAIN,

Defendant-Appellant.

No. 299475
Muskegon Circuit Court
LC No. 09-057430-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his first-degree felony murder conviction, MCL 750.316(1)(b). Defendant was sentenced to life imprisonment without the possibility of parole. For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEEDINGS

Early in the morning of January 8, 2009, the victim in this case, D’Andre Jordan, was walking through his neighborhood when two men assaulted, robbed, and shot him with a handgun. A man who lived near the scene of the crime called 9-1-1 after hearing two gunshots and men yelling. He testified that he observed two men, one of whom was yelling at a third individual who was on the ground. Another witness testified that he was walking near the scene of the crime that night, and he saw the victim walking in the same area. The witness testified that shortly after seeing the victim he saw two young men coming from a nearby alley, and moments later he heard gunshots. A final witness testified that he drove by and observed two men beating and kicking another man who was on the ground. When the witness turned around and drove back to the scene he yelled at the men to stop, and informed them that he was calling the police. A gunshot was fired through the door of his truck. The two assailants fled the scene. When police arrived the victim told them he was robbed by two younger males who beat him with a gun and shot him. The victim died en route to the hospital.

Defendant was arrested in connection with the murder in the early morning hours of January 10, 2009. Detective Steven White questioned defendant on two separate occasions. Defendant first denied any knowledge of the murder and claimed he was at home the entire night; however, after the detective told defendant that witnesses could identify him at the scene defendant stated he was with Sema’j Lawson when Lawson assaulted and shot the victim.

The second time defendant was questioned by White he explained that Lawson and the victim got into an altercation. Defendant stated that the victim appeared to have the upper hand in the fight so defendant got involved and started fighting with the victim. Defendant told the detective that he saw Lawson beat the victim with a gun, shoot him, and go through his pockets. Defendant explained that Lawson pulled the gun out a second time, handed the gun to defendant, and indicated that defendant should shoot the victim too. Defendant indicated that he tried to give the gun back to Lawson. Defendant said that as he was holding the gun, his finger was on the trigger and when Lawson grabbed the gun defendant pulled the trigger and the gun fired. Defendant was not sure, but he assumed that the bullet hit the victim.

The day before defendant's jury trial, defense counsel moved the trial court to suppress defendant's statements to police regarding his involvement in the murder. The trial court denied defendant's motion and the statements were admitted during trial. The jury was instructed on second-degree and first-degree murder, and found defendant guilty of first-degree felony murder. Defendant now appeals his conviction.

II. ADMISSION OF EVIDENCE

Defendant challenges the admission of statements made by Detective White during their initial meeting on the basis that the statements constituted hearsay and violated his right of confrontation. Specifically, defendant challenges White's statement that Lawson implicated defendant in the murder.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id.*

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). We conclude that Detective White's statements were not hearsay because they were not offered to prove the truth of the matter asserted. MRE 801(c). Rather, the prosecutor introduced the statements to demonstrate the way in which Detective White motivated defendant to initially admit his involvement in the murder. See *People v Johnson*, 100 Mich App 594, 599; 300 NW2d 332 (1980). Further, because the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted, defendant's right of confrontation was not violated. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) (Concluding that "a statement offered to show why police officers acted as they did is not hearsay"). Accordingly, the trial court properly exercised its discretion when it admitted the evidence.

Defendant also argues that the evidence was more prejudicial than probative and therefore, should not have been admitted. Because no MRE 403 objection was raised in the trial court, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of evidentiary error for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice exists where there is “a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury” or “it would be inequitable to allow the proponent of the evidence to use it.” *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (internal citation and quotation omitted). In this case, the statements were highly probative of the context in which defendant initially admitted his involvement in the murder. While danger of unfair prejudice existed in that the jury would use the statements as substantive evidence of defendant’s guilt, the trial court provided a limiting instruction that the jurors were not to use the testimony as substantive evidence of defendant’s guilt. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Further, defendant admitted to fighting with and shooting the victim the second time he was questioned, and that interrogation was played for the jury at trial. In light of the trial court’s limiting instruction and the defendant’s own admission of guilt, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights.

III. ADMISSION OF DEFENDANT’S STATEMENTS TO POLICE

Defendant argues that the trial court erred in denying his motion to suppress the statements he made when questioned by Detective White.

We review for clear error a trial court’s findings of fact in a suppression hearing, and will uphold those findings unless left with a definite and firm conviction that a mistake was made. *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008). We review de novo a trial court’s ultimate ruling on a motion to suppress. *Id.*

Defendant first argues that when he stated “[y]a’ll just take me to jail” the first time he was questioned, the failure of the detective to cease questioning him violated his *Miranda*¹ right to remain silent. After hearing argument and evidence presented at defendant’s motion to suppress, the trial court determined that there was no evidence of any *Miranda* violation. The trial court did not specifically address whether defendant’s statement “ya’ll just take me to jail” constituted an invocation of his right to remain silent, but it explained that the evidence demonstrated defendant was fully *Mirandized* before making his statements to police and that there was no evidence of any *Miranda* violation.²

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² Audio recordings of both times defendant was questioned were presented to the trial court, as well as a video recording of the first interrogation. A signed waiver of rights that defendant executed before taking a polygraph test was also submitted to the trial court at the suppression hearing. Defendant was never given the polygraph test after signing the waiver and was instead interviewed by Detective White. Detective White also testified that he read defendant his *Miranda* rights before each interrogation, and defendant understood and waived his right to remain silent.

To trigger the requirement that the police stop questioning, a defendant's invocation of his right to remain silent must be unequivocal. *People v Leroy Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). We conclude that the trial court did not err when it found that there was no evidence of a *Miranda* violation in this case. Defendant's utterance was not a clear indication that he wished to cut off all questioning and terminate the interrogation; therefore, it did not constitute an unequivocal invocation of his right to remain silent and Detective White was not required to cease questioning defendant. See *People v Catey*, 135 Mich App 714, 725-726; 356 NW2d 241 (1984). Accordingly, the trial court properly denied defendant's motion to suppress the statement on the basis that defendant did not unequivocally assert the right to remain silent.

Defendant next argues that his *Miranda* rights were violated when the police failed to clarify his inquiry about whether counsel would be present the second time he was questioned by police. Defendant mischaracterizes the sequence of events on that date. The record reveals that defendant was to take a polygraph examination and asked whether he would have an attorney during the questioning. Defendant then waived his *Miranda* rights and did not invoke his right to counsel before Detective White questioned him a second time. Accordingly, we conclude that the trial court properly denied defendant's motion to suppress his statements because we conclude that its factual finding that there was no violation of defendant's *Miranda* rights was not clear error. Accordingly, suppression was not warranted.

Defendant also argues that his statements to the detective were involuntary. The test of voluntariness of a confession is "whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (internal citations and quotations omitted). The Court in *Cipriano* set forth several factors that a trial court should consider in determining whether a statement is voluntary including the accused's intelligence, lack of any advice to the accused on his rights, his health, and his deprivation of food or sleep. *Id.* at 334. Trial courts may also consider any promises made to a defendant when evaluating the voluntariness of a defendant's statements, *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997), and for a confession to be held involuntary, a causal connection must be shown between the alleged promise and the defendant's decision to confess. *People v Conte*, 421 Mich 704, 741; 365 NW2d 648 (1984).

On appeal, defendant specifically argues that the trial court should have determined that his low IQ, lack of sleep and food, and suicidal tendencies rendered his confession involuntary. We find no clear error. At the conclusion of the suppression hearing, the trial court made specific factual findings regarding each factor mentioned by the *Cipriano* Court, including defendant's IQ, alleged deprivation of sleep and food, and alleged suicidal tendencies. The record does not support any of defendant's assertions, and the trial court's detailed findings were supported by the evidence before it.

The record evidence supports the trial court's conclusion that there was no indication defendant had not eaten for days, or was sleep deprived, or was suicidal. And it acknowledged as undisputed that defendant had an eighth grade education, which he completed as a special education student; a circumstance that could support defendant's claim. Further the trial

analyzed the evidence presented and found under the circumstances that defendant's statement was not involuntary.

In reviewing the trial court's factual findings, we are not left with a definite and firm conviction that a mistake has been made. Further, upon de novo review of the trial court's ultimate decision, we agree with the trial court that the evidence did not support suppression of defendant's statements because there was no indication that defendant's freewill was overborne or that his capacity for self-determination was critically impaired. *Cipriano*, 431 Mich at 333-334.

Defendant also argues that several other statements made by Detective White constituted coercive promises that overbore his freewill. During the motion hearing, the trial court considered the challenged statements made by the detective. Defendant does not challenge the accuracy of the trial court's factual determination regarding what statements were specifically made; rather, defendant argues that the trial court erred when it determined that the detective's statements did not render his statements to the detective involuntary. We find no error upon de novo review of the trial court's ultimate decision regarding whether the detective's statements rendered defendant's statements involuntary. A close review of the challenged statements made by the detective reveals that they were factually correct and were not coercive. Detective White provided defendant with the opportunity to exculpate himself when he stated that it was defendant's opportunity "not to be an accessory." Detective White then allayed defendant's concerns for his safety by conveying that Lawson was in custody and thus could not harm defendant if defendant implicated him. Finally, Detective White indicated that he would assist defendant. Consequently, we find that the trial court did not err when it determined that these statements did not render defendant's statements involuntary because there is no indication that these statements overbore defendant's freewill or that his capacity for self-determination was critically impaired. *Id.* Further, to the extent any of Detective White's statements constituted promises, there is no evidence to support the conclusion that there was a causal connection between the promises and defendant's decision to confess. *Conte*, 421 Mich at 741.

Defendant also argues that Detective White's unfulfilled promise that he would get to speak to his mother rendered his statements involuntary. We find no clear error and agree with the trial court's determination that the detective's promise did not render defendant's statements involuntary. The record reveals that defendant did not request to speak to his mother the first time he was questioned; Detective White simply stated that he would let defendant speak to his mother when they were finished talking. Detective White never threatened defendant or promised defendant—besides that he could talk to his mother—to induce him to talk and he could not recall if he allowed defendant to talk to his mother. The record shows no causal connection between Detective White's promise that he would let defendant talk to his mother and defendant's decision to confess. *Conte*, 421 Mich at 741.

Accordingly, we conclude that the trial court's ultimate decision to deny defendant's motion to suppress was not error in light of the trial court's factual determinations regarding defendant's allegations.

IV. EXCLUSION OF ALIBI DEFENSE

Defendant next argues that the trial court erred in denying him permission to present his parents as alibi witnesses.

We review a trial court's decision whether to permit a party to introduce alibi evidence where the party has not complied with the notice-of-alibi statute, MCL 768.20, for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680, 682; 505 NW2d 563 (1993). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Feezel*, 486 Mich at 192.

"In determining how to exercise its discretionary power to exclude the testimony of undisclosed witnesses . . . a [] court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." *Travis*, 443 Mich at 682 (quotation omitted).

Applying the considerations to the facts of this case, the failure to disclose defendant's parents as alibi witnesses until the end of the third day of trial was highly prejudicial to the prosecution because, even though the prosecution was aware that defendant stated he was at home at the time of the crime the first time police questioned him, the prosecution had already presented all of its witnesses at the time of the request and therefore, could not modify its presentation of the case to address the alibi defense. The reason for the nondisclosure was that defense counsel did not believe that an alibi defense was plausible and only pursued the request at the insistence of defendant and his parents. The harm caused by nondisclosure could not be mitigated by subsequent events because the prosecution had already presented all of its witnesses at the time of the request. The weight of the properly admitted evidence supporting defendant's guilt was significant; defendant admitted shooting the victim and circumstantial evidence supported defendant's confession. Also relevant was the fact that defendant's parents had been present in the courtroom for the duration of the trial, which could have impacted their testimony. Accordingly, we conclude that the trial court's decision to deny defendant's request to present his parents as alibi witnesses fell within the range of principled outcomes and constituted a proper exercise of discretion.

Defendant also maintains that the trial court should have granted a continuance sua sponte so that he could file a timely alibi notice. However, "[a] trial court has no duty to grant a continuance on its own motion and, thus, absent a motion for a continuance at trial, we will not review the issue on appeal." *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990). Accordingly, we decline to consider whether a continuance would have been appropriate if one had been requested.

Defendant also argues that defense counsel was ineffective for failing to timely file a notice of alibi. Because no evidentiary hearing was held regarding defendant's ineffective assistance claims, this Court's inquiry is limited to mistakes apparent on the record. *People v Marcus Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is

reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The record reveals that defense counsel made a strategic choice not to file a notice of alibi. Defense counsel asked the trial court to permit testimony from alibi witnesses at the end of the third day of trial, and in the course of making that request defense counsel indicated that he informed defendant that "this is not a plausible defense," and that he took "responsibility" for failing to timely file a notice of alibi because he "thought it was absolutely the wrong thing to do." Defense counsel has wide discretion in regard to matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and we will not substitute our judgment for that of counsel regarding such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defense counsel's decision not to file a timely notice of alibi was reasonable in light of defendant's statements to police in which he admitted presence at the scene of the crime and defendant's theory of the case. Defendant did not argue that he was not present at the scene of the crime, and instead maintained throughout his trial that there was no evidence of the intent required to convict him of first-degree felony murder. Defense counsel argued in closing that "this is an event that just got out of hand and that no one went into it with the idea that there was malicious intent. We ask you to find him not guilty of felony murder and give your consideration to whether or not there is any second-degree murder or any evidence of that." Accordingly, because defense counsel's decision not to pursue an alibi defense was reasonable trial strategy in light of defendant's admissions and theory of the case, defendant has failed to establish a claim of ineffective assistance of counsel because he has not demonstrated that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness. *Jordan*, 275 Mich App at 667.

V. JURY INSTRUCTIONS

Defendant next argues that the trial court erred in denying his request for an instruction on voluntary manslaughter. Jury instructions involving questions of law are reviewed de novo, and a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

"Manslaughter is a necessarily included lesser offense of murder." *Id.* at 137. "[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.*, quoting *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). "The elements of voluntary manslaughter are: '(1) the defendant must kill in the heat of passion, (2) the passion must be caused by adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions.'" *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009), *aff'd* 488 Mich 922 (2010), quoting *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), *aff'd* 461 Mich 992 (2000). "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation is adequate if it would cause a reasonable person to lose control. *Id.* "Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter." *Id.*

We conclude that in this case, a rational view of the evidence did not support an instruction on voluntary manslaughter. Defendant stated that he became involved in the fight between the victim and Lawson in order to assist Lawson, and that Lawson placed a gun in his hand and instructed him to pull the trigger, which he did. There was simply no evidence that defendant killed the victim in the heat of passion because the evidence does not support a conclusion that defendant was adequately provoked. Accordingly, the trial court's denial of defendant's request for an instruction on voluntary manslaughter was not error.

Defendant also argues that defense counsel was ineffective for failing to request an instruction on involuntary manslaughter; however, defendant does not specify whether the trial court should have instructed the jury on common law involuntary manslaughter or statutory involuntary manslaughter, MCL 750.329. Defendant has announced a position and left it to this Court to discover and rationalize a basis for his claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Accordingly, defendant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Id.* Nevertheless, we find that defendant would be unable to establish that there is a reasonable probability that the result of the proceedings would have been different if the jury was instructed on involuntary manslaughter in light of the fact that the jury was instructed on second-degree murder and declined to convict defendant of that lesser charge. See *People Wilson*, 265 Mich App 386, 396; 695 NW2d 351 (2005) (failure to give instructions on lesser offenses harmless where jury was given the option of an intermediate lesser offense and rejected it in favor of the greater offense). Accordingly, defendant has not demonstrated that defense counsel was constitutionally ineffective.

Defendant also argues that the trial court erred in failing to instruct the jury on accident. However, defendant waived this issue by failing to request an instruction on accident and expressing satisfaction with the instructions as given. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Similarly, defendant argues that defense counsel was ineffective for failing to request an instruction on accident. Because defendant indicated that his finger was on the trigger of the gun, and that when Lawson grabbed the gun he unintentionally pulled the trigger, the evidence in this case could have supported an accident instruction; however, "[t]he law does not require counsel to raise every available nonfrivolous defense." *Knowles v Mirzayance*, 556 US 111, ___; 129 S Ct 1411; 173 L Ed 2d 251 (2009). Defense counsel's apparent decision not to pursue an accident defense and request an accident instruction constituted a matter of trial strategy, which we will not second-guess on appeal. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). Further, defendant has failed to demonstrate that it is reasonably probable that, but for counsel's failure, the result of the proceeding would have been different where the jury was instructed on second-degree murder and rejected that lesser charge. See *People v Hawthorne*, 474 Mich 174, 185; 713 NW2d 724 (2006) (failure to instruct on the defense of accident requires reversal only where reliability of the verdict is undermined). Accordingly, defendant has failed to establish a claim of ineffective assistance of counsel because he has not demonstrated that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness. *Jordan*, 275 Mich App at 667.

Lastly, defendant argues that the trial court erred by giving the jury an instruction on malice that lessened the prosecution's burden of proof. Specifically, defendant challenges the trial court's instruction on malice, which was different from CJI2d 16.4(3).³ However, the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court and use of the standard jury instructions is not required. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). The instruction regarding the malice element in CJI2d 16.4(3) reflects language set out in *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984), and the instruction regarding the malice element that was given by the trial court reflects language set out in *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).⁴ The trial court's malice instruction accurately described the state of mind element of first-degree felony murder as explained in *Aaron, supra*, which is binding. This Court has noted that while the two definitions of malice are not necessarily consistent, our Supreme Court has used them interchangeably. *People v Bulls*, 262 Mich App 618, 626 n 5; 687 NW2d 159 (2004). Because the definition of malice was not erroneous or misleading, the trial court's instruction constituted a proper exercise of discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering

³ CJI2d 16.4(3) defines malice as follows:

Second, that the defendant had one of these three states of mind: [he/she] intended to kill, or [he/she] intended to do great bodily harm to [*name deceased*], or [he/she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his/her] actions.

⁴ The trial court defined malice as:

Second, that [defendant] had at least one of these three states of mind: A, he intended to kill [the victim] or B, he intended to do great bodily harm to [the victim] or C, he acted in wanton and willful disregard of the likelihood that the natural tendency of such behavior was to cause death or great bodily harm.